CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 439

RUFUS R. RAND, JR., PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

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RUFUS R. RAND, JR., PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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[fol. a] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

RUFUS R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER EXTENDING TIME TO FILE RECORD TO JANUARY 21, 1935

For cause appearing of record it is

Ordered that the time for transmission and delivery of the record sur petition for review of the above entitled proceeding in the United States Circuit Court of Appeals for the Eighth Circuit be and it is hereby extended to January 21, 1935.

Eugene Black, Member.

Dated: Washington, D. C., Dec. 24, 1934.

Now, December 27, 1934, the foregoing order enlarging time certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

(Endorsed:) Filed in the United States Circuit Court of Appeals for the Eighth Circuit on January 10, 1935, E. E. Koch, Clerk.

BEFORE U. S. BOARD OF TAX APPEALS

[Title omitted]

Appearances:

For Taxpayer: Howe P. Cochran, Esq.
For Comm'r: E. L. Corbin, Esq., James K. Polk, Esq.

[fol. 2] DOCKET ENTRIES

1931.

Dec. 7—Petition received and filed. Taxpayer notified. (Fee paid.)
" 7—Copy of petition served on General Counsel.

1932.

Feb. 4—Answer filed by General Counsel.
" 12—Copy of answer served on taxpayer. General Calendar.
Mar. 15—Motion to strike answer filed by taxpayer. 3/19/32 copy served.
" 18—Hearing set April 13, 1932, on motion. 3/19/32 copy served.
Apr. 13—Hearing had before Mr. Goodrich, Div. 11 on petitioner's motion to strike answer—granted—exception to Commissioner.
" 13—Order granting motion and Commissioner allowed 60 days to amend answer entered.
Jun. 6—Amended answer filed by General Counsel. 8/5/32 copy served.
Nov. 21—Hearing set for week of Dec. 7, 1932 at St. Paul, Minn.
" 22—Motion for 60 days continuance filed by taxpayer. 12/1/32 granted and restored to D. C. Calendar.
Dec. 29—Hearing set 2/1/33.

1933.

Jan. 20—Motion for continuance to Circuit Calendar at St. Paul, filed by taxpayer. 1/23/33 granted.
Jun. 1—Hearing set for week of July 10, 1933 at St. Paul, Minn.
" 12—Motion for continuance to 9/1/33 at St. Paul, filed by taxpayer. 6/13/33 granted—6/14/33 copy served.
" 13—Hearing set June 21, 1933 on motion. 6/14/33 copy served.

1934.

Jan. 12—Hearing set for week of 3/19/34 at St. Paul, Minn.

Mar. 23—Hearing had before Mr. Lansdon, Div. 8 on merits. Submitted. Stipulation of facts filed. Called 3/19/34.

[fol. 3] Apr. 5—Transcript of hearing of March 23, 1934 filed.

May 24—Memorandum opinion rendered, Mr. Lansdon, Div. 8. Decision will be entered in conformity with stipulation.

" 28—Decision entered, Div. 8.

Jun. 1—Order amending memorandum opinion of May 24, 1934 entered.

Jul. 23—Motion to vacate decision and for rehearing filed by taxpayer.

Aug. 25—Order vacating decision of May 28, 1934 entered.

Sep. 13—Order re-entering decision of May 28, 1934 and denying motion to vacate entered.

" 13—Decision entered, Mr. Turner, Div. 8.

Oct. 26—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by taxpayer.

Oct. 26—Proof of service filed.

Nov. 24—Agreed statement of evidence lodged.

" 27—Notice of lodgment of statement of evidence with hearing notice Dec. 7, 1934 filed.

Dec. 4—Agreed statement of evidence approved and ordered filed.

" 17—Præcipe with proof of service thereon filed.

" 24—Order enlarging time to January 21, 1935 for transmission and delivery of the record sur petition for review entered.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION OF R. R. RAND, JR.—Filed December 7, 1931

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency [fol. 4] (IT:AR:D-1 HBA-60-D) dated November 5, 1931, and as a basis for his proceeding alleges as follows:

1. The Petitioner is an individual who resides at Stillpond, near Minnetonka Mills, Hennepin County, Minnesota. Petitioner's business address is 2500 Rand Tower, Minneapolis, Hennepin County, Minnesota.

2. The Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to Petitioner on November 5, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928. Respondent has determined that Petitioner's tax liability is $238,493.11. The tax previously assessed is $193,773.39. The deficiency asserted is $44,719.72. Of the foregoing the deficiency and $64,296.02, as nearly as it may be computed, is in controversy.

4. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a) Respondent erred in determining that the fair market value on January 30, 1922, of the common stock of Minneapolis Gas Light Company, was $111.482 per share, in that the fair market value per share of said stock was, on said date, $610.00.

(b) Respondent erred in determining that the fair market value on January 28, 1927, of the common stock of Minneapolis Gas Light Company was $99.44 per share, in that the fair market value per share of said stock was, on said date, $267.00.

(c) Respondent erred in determining that 962-2/3 shares of the common stock of Minneapolis Gas Light Company, sold by Petitioner on or about May 28, 1928, had not been held by Petitioner for more than two years, in that said shares had been continuously held by Petitioner since October 31, 1925, until sold.

(d) Respondent erred in determining that 248 shares of the common stock of Pillsbury Flour Mills, Inc., 33 shares of the Preferred stock of Archer Daniels Midland Co., 8 shares of the common stock of Archer Daniels Midland Co. and 7 shares of the Preferred stock of Vassar Swiss Underwear Company, sold by Petitioner during the calendar year 1928, had not been held by Petitioner for more than two years, in that said shares had been continuously held by Petitioner since October 31, 1925, until sold.

[fol. 5] (e) Respondent erred with respect to 248 shares of the common stock of Pillsbury Flour Mills Company in determining that the cost thereof to Petitioner was $4,383.41 and the sale price thereof was $8,804, in that the cost of said stock to Petitioner was $4,373.47 and the sale price thereof was $8,756.88.

5. The facts upon which Petitioner relies as the basis of this proceeding are as follows:

(a) On May 28, 1928, petitioner was the owner of 3281 shares of the common stock of Minneapolis Gas Light Company, a corporation engaged in the business of manufacturing and selling gas in the City of Minneapolis, Hennepin County, Minnesota. On said date petitioner sold said 3281 shares and received therefor $1,497,107.50. Said shares were acquired by Petitioner at the time and in the manner hereinafter alleged and petitioner's basis therein at May 28, 1928, was as follows:

(b) 700 shares of said stock were acquired by Petitioner by inheritance from R. R. Rand, Sr., who died intestate on April 15, 1921, and whose estate, including said 700 shares, was distributed to his heirs, pursuant to the formal decree of distribution of the Probate Court in and for Hennepin County, Minnesota, on January 30, 1922. The fair market value on January 30th, 1922, of shares of the common stock of Minneapolis Gas Light Company was $610.00.

(c) 1225 shares of said stock were acquired by Petitioner on April 29, 1925, from said Minneapolis Gas Light Company as a stock dividend in respect of the 700 shares next hereinbefore referred to.

(d) 962-2/3 shares of said stock were acquired by Petitioner by inheritance from Alonzo T. Rand, who died intestate on October 31, 1925, and whose estate, including said 962-2/3 shares was distributed to his heirs pursuant to the formal decree of distribution of the Probate Court in and for Hennepin County, Minnesota, on January 28, 1927. The fair market value on January 28, 1927, of shares of the common stock of said Minneapolis Gas Light Company, was $267.00 per share.

(e) 200 shares of said stock were acquired by Petitioner on January 14, 1926, by purchase and Petitioner paid therefor $55.00 per share.

(f) 193⅓ shares of said stock were acquired by Petitioner on October 21, 1927, by purchase and the Petitioner paid therefor $85.00 per share.

[fol. 6] (g) On May 28, 1928, Petitioner was the owner of 248 shares of the common stock of Pillsbury Flour Mills, Inc., a corporation, 33 shares of the preferred stock of Archer Daniels Midland Co., a corporation, 8 shares of the common stock of Archer Daniels Midland Co., a corporation, and 7 shares of the preferred stock of Vassar Swiss Underwear Company, a corporation. Said shares were acquired by Petitioner by inheritance from Alonzo T. Rand, who died intestate on October 31, 1925, and whose estate, including said 962-2/3 shares, was distributed to his heirs pursuant to the formal decree of distribution of the Probate Court in and for Henepin County, Minnesota, on January 28, 1927. Petitioner sold said shares in the calendar year 1928. The amounts received therefor and the cost or basis to Petitioner thereof were as follows:

	Amount Received	Cost
33 shares Archer Daniels Midland Co. Preferred	$3,732.93	$3,498.00
8 shares Archer Daniels Midland Co. Common	648.66	325.00
7 shares Vassar Swiss Underwear Company Preferred	784.00	700.00
248 Pillsbury Flour Mills, Inc. common	8,756.88	4,383.41

Wherefore Petitioner prays that this Board may hear the proceeding and determine:

(a) That the fair market value on January 30, 1922, per share of the common stock of Minneapolis Gas Light Company was $610.00.

(b) That the fair market value on January 28, 1927, per share of the common stock of Minneapolis Gas Light Company was $267.00.

(c) That petitioner held 962-2/3 shares of the common stock of Minneapolis Gas Light Company, 248 shares of the common stock of Pillsbury Flour Mills, Inc., 33 shares of the preferred stock of Archer Daniels Midland Co., 8 shares of the common stock of Archer Daniels Midland Co. and 7 shares of the preferred stock of Vassar Swiss Underwear Company, acquired by him by inheritance from Alonzo T. Rand, continuously from October 31, 1925.

(d) That the amount received by Petitioner for 248 shares of the common stock of Pillsbury Flour Mills, Inc. was $8,756.88.

[fol. 7] (e) That there is an overpayment of Petitioner's tax liability for the calendar year 1928.

(f) That there is no deficiency in Petitioner's tax liability for said year.

Howe P. Cochran, Munsey Building, Washington, D. C.; J. B. Faegre, 1260 Northwestern Bank Bldg., Minneapolis, Minn., and Leland W. Scott, 1310 First National-Soo Line Bldg., Minneapolis, Minn., Counsel for Petitioner.

Duly sworn to by R. R. Rand, Jr. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

NP-2-28

IT:AR:D-1
HBA-60D

Mailed Nov. 5, 1931.

Mr. R. R. Rand, Jr.,
2500 Rand Tower,
Minneapolis, Minnesota.

SIR:

You are advised that the determination of your tax liability for the year(s) 1928 discloses a deficiency of $44,719.72, as shown in the statement attached.

[fol. 8] In accordance with Section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, If You Do Not Desire To Petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing

of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; Whereas If No Agreement Is Filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully, David Burnet, Commissioner, by J. C. Wilmer, Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870
mm-4

Statement

IT:AR:D-1
HBA-60D

In re: Mr. R. R. Rand, Jr., 2500 Rand Tower, Minneapolis, Minnesota.

Tax Liability

Year.	Tax Liability.	Tax Assessed.	Deficiency.
1928	$238,493.11	$193,773.39	$44,719.72

Reference is made to the report of the internal revenue agent in charge at Saint Paul, Minnesota, to your protest submitted under date of July 18, 1930, and to the conference held in this office on October 8, 1931.

Your contention that the value as of January 28, 1927, of common stock of the Minneapolis Gas Light Company was $124.79 instead of $99.44, the amount recommended as the [fol. 9] result of the conference held in the office of the internal revenue agent in charge has been denied. The value recommended has been determined by direct comparison with common stocks of light companies which were listed on the New York Stock Exchange or curb and determining therefrom the ratio between selling prices and earnings and applying this same ratio to the earnings per share of the stock in question. This method has been sustained by this office.

Your contention that profit from the sale of 962 2/3 shares of stock of the Minneapolis Gas Light Company acquired from the Estate of A. T. Rand should be considered as capital gain has also been denied.

Your attention is called to section 101 (c) (8) (B) of the Revenue Act of 1928, wherein it is provided that in determining the period for which the taxpayer has held property there shall be included the period for which such property was held by any other person if under the provisions of section 113 such property has for the purpose of determining gain or loss from a sale or exchange the same basis in whole or in part in the taxpayer's hands as it would have in the hands of such other person.

Mr. R. R. Rand, Jr. Statement.

1928

From the above it is apparent that the period during which the taxpayer has held property for capital gain purposes is directly related to the basis to be used for gain or loss purposes.

Since the stock in question was acquired by intestacy and the stock was distributed to you on January 28, 1927, the basis for gain or loss purposes is the value as of the date distributed in accordance with section 113 (a) (5) of the Revenue Act of 1928.

It is therefore held that the property was not held by you two years prior to sale and the profit represents ordinary income.

[fol. 10] Ordinary net income shown on return		$215,933.13
Add:		
1. Increase in salary		833.36
2. Increase in interest received		581.00
3. Increase in profit from sales		348,116.84
Total		$565,464.33
Deduct:		
4. Increase in interest paid	$581.00	
5. Losses transferred from capital gain and loss	12,700.00	
		13,281.00
Ordinary net income adjusted		$552,183.33
Capital net gain shown on return		$1,211,357.80
Deduct:		
6. Decrease in profit		314,640.19
Capital net gain adjusted		$896,717.61

1928

Computation of Tax

Ordinary net income		$552,183.33
Less:		
Dividends	$54,508.63	
Personal exemption	5,100.00	
		59,608.63
Income subject to normal tax		$492,574.70
Normal tax at 1½% on $ 4,000.00		60.00
Normal tax at 3% on $ 4,000.00		120.00
Normal tax at 5% on $484,574.70		24,228.74
Surtax on $552,183.33		102,096.67
Tax at 12½% on $896,717.61		112,089.70
Total tax		$238,595.11
Less:		
Earned income credit	$19.70	
Income tax paid at source	82.30	
		102.00
Tax Liability		$238,493.11
Tax assessed		193,773.39
Deficiency		$44,719.72

Explanation of Adjustments

1. Net salary was understated in the return by $833.36, the correct amount being $9,727.46 instead of $8,894.10 as reported.

2. This adjustment represents payment of accrued interest on tax-free covenant bonds erroneously offset against tax-free covenant bond interest received.

[fol. 11] 3. Profit of $97,537.39 reported from the sale of securities held less than two years prior to sale has been increased by the following:

Number of shares	Corporation	Sale price	Cost	Profit
248	Pillsbury	$8,804.00	$4,383.41	$4,420.59
962 2/3	Minneapolis Gas Light Company	439,261.05	95,727.57	343,533.48
	Total			$347,954.07
	Decrease in cost of 193 1/3 shares Minneapolis Gas Light Company stock (at $85.00—$16,433.33 instead of $16,596.10)			162.77
	Total increase			$348,116.84

4. See explanation of adjustment 2 above.

5. Since this loss was sustained through worthlessness of stocks it constitutes an ordinary rather than a capital loss.

6. The adjustments in capital net gain are as follows:

Profit reported on 248 shares common stock of the Pillsbury Flour Mills transferred to ordinary gain	$6,738.91
Decrease in profit from sale of 700 shares Minneapolis Gas Light Company stock (basis $111.482 per share)	1,471.40
Profit reported from sale of 962 2/3 shares Minneapolis Gas Light Company stock transferred to ordinary gain	319,129.88
Total decrease	$327,340.19
Total decrease (brought forward)	$327,340.19
Add:	
Loss on worthless stock eliminated from capital gain	12,700.00
Net decrease	$314,640.19

A consent which will expire December 31, 1931, except as extended by the provisions of section 277 of the Revenue Act of 1928 is on file for the year 1928.

Copies of this communication have been furnished your representatives in accordance with the authority conferred upon them in the power of attorney executed by you and on file with the Bureau.

[fol. 12] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

AMENDED ANSWER OF COMMISSIONER OF INTERNAL REVENUE—Filed June 6, 1932

Comes now the Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel for the Bureau of Internal Revenue and for his amended answer to the petition of the above-named taxpayer admits and denies as follows, to-wit:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1928; that respondent determined petitioner's tax liability to be $238,493.11; that $193,773.39 has been assessed and that the deficiency asserted is $44,719.72, as alleged in paragraph 3 of the petition. Denies the remaining allegations contained in paragraph 3.

4. Denies the allegations of error contained in paragraphs 4(a) to (e), inclusive, of the petition.

5. Denies the allegations contained in paragraphs 5(a) to (g), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

C. M. Charest, General Counsel, Bureau of Internal Revenue. Of Counsel: Mason B. Leming, John R. Gaskins, Special Attorneys, Bureau of Internal Revenue.

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 53902, 57365, 60782, 60784 and 60785

ELIZABETH RAND STONE, Formerly Elizabeth Rand Anderson, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

SUSANNE J. RAND, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

RUFUS R. RAND, JR., as Executor of the Estate of Mary R. Birch, Deceased, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

KATE A. OGLE, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Hayner N. Larson, Esq., for the petitioners.
James K. Polk, Jr., Esq., for the respondent.

OPINION

LANSDON:

The respondent has determined deficiencies for the year 1928 in the respective amounts of $26,130.38, $6,100.76, $23,878.36, $44,719.72 and $103,523.72. The only issue sub-

mitted for our decision is whether certain profits realized from the sale of stocks in 1928 are taxable as capital gains or as ordinary income. The parties have filed stipulations as follows:

The number of shares of the common capital stock of the Minneapolis Gas Light Company outstanding from before 1905 to April 30, 1925, was 16,000 of a par value of $50 each; that on March 3, 1925, said company declared and on April 30, 1925, issued a stock dividend of 175% and that at all times thereafter the number of shares of common capital stock of said company outstanding was 44,000 shares of a par value of $50 each; that there was distributed to petitioner, Elizabeth Rand Anderson Stone, on May 1, 1919, 450 shares of said stock from the Estate of L. S. Rand, who died intestate April 16, 1918, and that said 450 shares were, together with other shares, sold on May 28, 1928, as hereinafter set forth; that on January [fol. 14] 30, 1922, there were distributed to petitioners, Rufus R. Rand, Jr., Mary Rand Birch, since deceased, and Susanne J. Rand, 700 shares each of said stock pursuant to a decree of distribution from the Estate of Rufus R. Rand, Sr., who died intestate, which said shares of stock were sold by said respective petitioners, together with other shares then owned by them, on May 28, 1928, as hereinafter set forth; and that on January 28, 1927, there were distributed to petitioner Kate A. Ogle, 1,925⅓ shares and to petitioners, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and Mary Rand Birch, since deceased, 962⅔ shares each of said stock pursuant to a decree of distribution from the Estate of Alonza T. Rand, who died intestate October 31, 1925, all of which said shares were sold on May 28, 1928, as hereinafter set forth.

That the 450 shares of the said stock of the Minneapolis Gas Light Company, distributed to Elizabeth Rand Anderson Stone on May 1, 1919, had a fair market value on that date of $139.84 per share; that the 700 shares of the said capital stock of the Minneapolis Gas Light Company distributed to each of the petitioners, Rufus R. Rand, Jr., Mary Rand Birch and Susanne J. Rand, on January 30, 1922, had a fair market value on that date of $175 per share, and that the 962⅔ shares of the said Minneapolis Gas Light Company distributed to each of the petitioners, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and

Mary Rand Birch, since deceased, and the 1,925⅓ shares distributed to petitioner, Kate A. Ogle, under date of January 28, 1927, had a fair market value on that date of $176 per share.

That on May 28, 1928, the petitioners sold the shares of common stock of said Minneapolis Gas Light Company acquired as stated in paragraph 2 above, for cash as indicated below:

Name of petitioner	Valuation date	No. of shares	Basis for gain or loss	Cash received	Taxable gain
Elizabeth Rand Anderson Stone	5- 1-1919	450	$62,928.00	$339,141.24	$276,213.24
	1-28-1927	962-2/3	169,419.33	263,822.20	94,402.87
Susanne J. Rand	1-30-1922	700	122,500.00	527,553.50	405,053.50
Mary Rand Birch	1-30-1922	700	122,500.00	527,553.18	405,053.18
	1-28-1927	962-2/3	169,419.33	263,822.26	94,402.93
Rufus R. Rand, Jr.	1-30-1922	700	122,500.00	878,369.99	755,869.99
	1-28-1927	962-2/3	169,419.33	439,261.05	269,841.72
Kate A. Ogle	1-28-1927	1,925-1/3	338,838.67	527,644.84	188,806.17

It is further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company stock distributed to said petitioners on January 28, [fol. 15] 1927, is not capital gain and is not taxable at the rate provided in section 101 of the Revenue Act of 1928 but at the normal and surtax rates provided for by said Act, the Board may enter its final orders of deficiency or overpayment as follows:

Name of petitioner	Deficiency	Overpayment
Elizabeth Rand Anderson Stone	$4,881.74	[11.]
Suzanne J. Rand	.....	$5,711.74
Mary Rand Birch	.....	104.91
Rufus R. Rand, Jr.	20,736.45	.....
Kate A. Ogle	30,367.12	.....

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel of record, that the fair market value on March 1, 1913, of the stock of the Minneapolis Gas Light Company owned by this petitioner was $353.10 per share and that the said value on March 1, 1913, of the 1,900 shares of the Minneapolis Gas Light Company stock owned by the petitioner was $670,890.

It is further stipulated and agreed that the Board may find the March 1, 1913 value of the Minneapolis Gas Light Company stock so held by the petitioner to be in the amount of $670,890 as aforesaid, and that such finding of

value shall be binding upon the parties hereto for all purposes in this proceeding.

The Estate of Alonzo T. Rand, who died intestate October 31, 1925, had personal property of a market value of at least $1,840,948, and real estate of a market value of at least $263,800, a total of $2,104,748. Included in the personal property were cash of $223,814.73 and United States Government obligations of a market value of $145,829.60, a total of $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. Debts and obligations of the estate, constituting all debts and obligations paid or payable before and after January 28, 1927, were as follows:

1. Expenses of administration	$50,049.12
2. Funeral expenses	785.00
3. Taxes other than estate taxes	28,172.26
4. Claims of creditors	6,374.01
5. State and Federal estate taxes	178,451.90
A total of	$263,832.29

In his audit of the returns of the several petitioners for the taxable year, the respondent made many adjustments and determined the deficiencies now in controversy. The [fol. 16] petitioners allege numerous errors in such determinations but the stipulations, with one exception, settle all the pleaded issues. The parties now agree that the only question submitted to the Board is whether the profits realized from the sale of the stock of the Minneapolis Gas Light Company on May 28, 1928, by Martha A. Ogle, Elizabeth Rand Anderson Stone, Rufus R. Rand, Jr., and Mary Rand Birch should be taxed as capital net gains or as ordinary income.

The stock in question was inherited by the petitioners from Alonza T. Rand, who died intestate on October 31, 1925. It was distributed to the several petitioners on January 28, 1927 and sold by them on May 28, 1928. The parties now agree on the valuation of such stock as of the date of distribution, but differ as to the time it was held after acquisition. The respondent has based his deficiencies on the theory that such stock was held by the petitioners from the date of distribution to the date of sale, which was less than two years. The petitioners contend that they acquired the stock on the date of the death of

Alonzo T. Rand and held it continuously until the date of sale or for a period of more than two years. In several recent decisions the Board, on similar facts has decided this question adversely to the contentions of the petitioners. Nancy K. McFeely, 29 B. T. A. 998; Isabel K. Dibblee, 29 B. T. A. 1070. Upon the authority of such decisions, the determinations of the respondent are affirmed.

The parties have stipulated that if we hold that the profits in question should be taxed as ordinary income there are certain specified deficiencies and overassessments of the several petitioners for the year 1928.

Enter:
Entered: May 24, 1934.

Decisions will be entered in conformity with the stipulation.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket Nos. 53902, 57365, 60782, 60784, 60785

[Title omitted]

ORDER AMENDING OPINION

[fol. 47] For good cause, it is

Ordered: That the Memorandum Opinion of the Board in the above-entitled proceeding entered May 24, 1934, be, and the same is hereby, amended as follows:

(1) By inserting, in brackets, the name "Kate A. Ogle", immediately after the word "petitioner" in the next to the last paragraph on page three; and

(2) By substituting the word "Kate" for the word "Martha" in the seventh line of the first full paragraph on page four.

W. C. Lansdon, Member. (Seal U. S. Board of Tax Appeals, 1924.)

Dated June 1, 1934.

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 60784

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION—May 28, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 24, 1934, it is

Ordered and Decided: That there is a deficiency of $20,736.45 for the year 1926.

Enter:

Entered May 28, 1934.

W. C. Lansdon, Member. (Seal of U. S. Board of Tax Appeals.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION OF PETITIONERS TO VACATE OPINION AND DECISION—Filed July 23, 1934

[fol. 18] Docket Nos. 53902, 57365, 60782 and 60785

Come now the Petitioners in the above entitled causes, save and except Susanne J. Rand, by the undersigned, their counsel of record, and upon the pleadings, stipulation, the official report of proceedings before the United States Board of Tax Appeals at St. Paul, Minnesota, on March 23, 1934, the opinion entered herein May 24, 1934, and upon all the files and records herein move this Honorable Board to withdraw said opinion and vacate the decision entered herein on May 28, 1934, in the above entitled causes, save and except Docket No. 57365, and to reconsider the sole issue submitted for decision and rehear Petitioners thereon.

Petitioners assign the following as their reasons why this motion should be granted;

1. The decision is erroneous in that it is based on the doctrine that property, to qualify as "capital assets", must have been under the exclusive dominion and control of the taxpayer himself for over two (2) years. This doctrine was first formulated in Johnson vs. Commissioner, (C. C. A. 3) 552 F. (2d) 726, and Schoenberg vs. Burnet, (App. D. C.) 55 F. (ed) 543, relied upon by the Board in McFeely vs. Commissioner, 29 B. T. A. 998, and Dibblee vs. Commissioner, 29 B. T. A. 1070, but repudiated by the Supreme Court of the United States in Helvering vs. New York Trust Company, — U. S. —, (Opinion filed May 24, 1934, see 1 Prentice Hall Federal Tax Service 1934, Par. 1302, 343 C. C. H. 9314).

2. The decision is erroneous in that it is based on the doctrine that Section 113 (a) (5) Revenue Act of 1928 [fol. 19] amends Section 101, the capital gains section, of said Act, a result neither expressed nor intended by Congress.

3. The doctrine relied upon in the McFeely and Dibblee cases, supra, defeats the purpose of the capital gains section of the law plainly expressed to encourage the sale or exchange of property by providing a rate of tax on gain realized therefrom less onerous than the high normal and surtax rates.

4. The doctrine relied upon in the McFeely and Dibblee cases, supra, is erroneous because it fails to give effect to Sections 168 and 701 (b) of the Revenue Act of 1928, clearly related to the capital gains section whereby the Congress evidences an intention to provide that the period of holding of property acquired by inheritance shall commence from the date of decedent's death.

5. In the case of inherited property, the period of holding, required by the capital gains section of all taxpayers, is the period commencing at decedent's death, and an heir is not required to exclude therefrom the time between decedent's death and distribution.

Issue Presented

Were shares of stock, inherited from an intestate who died domiciled in Minnesota October 31, 1925, which were

distributed January 28, 1927, pursuant to a decree of distribution, "held" more than two years by the heirs on May 28, 1928, when they were sold, within the meaning of Section 101 (c) (8), Revenue Act of 1928?

Argument

(1) The doctrine that a taxpayer's tenure of property under the capital gains section commences as of the time when the taxpayer himself acquires dominion and control over such property has been completely repudiated by the Supreme Court of the United States in Helvering vs. New York Trust Company, supra. In this case it is held that the time during which a donor of personal property owned and held that property may be added to the time the trustee of an express trust for the benefit of the donor's son and the son, i. e., beneficiary and a donee, had title and control of property in order to determine the beneficiary's or donee's rights to the capital gain rate on the gain realized from the sale of the donated property. Thus it clearly appears that the periods of holding of two different persons, each having beneficial title for his own use, may be [fol. 20] united for the purpose of making up the more than two year period required by the capital gains section to constitute property "capital assets". Neither the trustee, beneficiary nor donee can be said to have dominion or control over property while it is still owned and held by a donor. It follows therefore that the Board's doctrine is unsound and erroneous and that, the decision of the Board in Petitioners' cases being based on that doctrine, Petitioners are in fairness entitled to a reconsideration of the sole issue presented.

2. Petitioners understand that the Board also supports its conclusion and its decisions in the McFeely and Dibblee cases, supra, on the ground that Section 113 (a) (5) of the Revenue Act of 1928 fixes the basis for determining gain or loss on the sale of property acquired by intestacy (the way Petitioners acquired the property involved) as the value thereof at the time of distribution (January 28, 1927, in Petitioners' case). Thus the Board concludes, erroneously, we submit, and without support from the language used in the statute, the published reasons of Congress for enacting Section 113 (a) (5), or the applicable law and rules, that this section is an amendment of or qualifies the

definition of "capital assets" in the capital gains section of the law. But that definition, originally adopted by Congress in the enactment of the capital gains section of the Revenue Act of 1921, has been repeatedly re-enacted without material change in the corresponding sections of each succeeding Revenue Act until the enactment of the Revenue Act of 1934. The rules for determining tenure first added by the Revenue Act of 1926 were not new law. Helvering vs. New York Trust Co., supra. Moreover upon the recommendation of the Joint Committee on Internal Revenue Taxation (November 15, 1927) pages 10 and 40, et seq., Congress re-enacted the capital gains section in the Revenue Act of 1928 without change. Two other pertinent sections of the Revenue Act of 1928, which we first discuss, are re-enactments of corresponding sections of the Revenue Acts of 1921, 1924, 1926, and were re-enacted in the Revenue Act of 1932. They are Sections 168 and 701 (b).

Section 168 provides in substance that in the case of an estate or a beneficiary thereof, the proper part of each share of the net income consisting of capital net gain, etc., shall be separately shown on the estate's return and taxed to the beneficiary or the estate as provided in the estate sections of the law but at the capital gains rate. Section [fol. 21] 701 (b) provides in substance that the term "includes" as used in any definition contained in the Act shall not be deemed to exclude other things otherwise within the meaning of the term defined. Thus in the case of personal property passing at death, although the legal title may go over to an executor or administrator, which is sold by the executor or administrator, under Section 168 the heir is entitled to the capital gain rate on that portion of the gain on which he is taxed, provided the property was held for more than two (2) years. And this is true, although the period of administration may not have ended, the sale was effected by the executor or administrator, and the heir did not have exclusive dominion and control over the property at the time of sale. Moreover, under Section 701 (b), which is but statutory recognition of a well known rule of construction, it clearly appears that paragraph (B) of Subsection (c) of the capital gains section of the law is in no sense a limitation upon the definition of capital assets found therein. This is so because, as will hereinafter be more fully shown, personal property passing at death vests in the decedent's heirs as of the date of death of the decedent.

Accordingly such property would, under the law, without Subparagraph (b), supra, being in the law, be within the definition of capital assets if the time which had elapsed between decedent's death and the date of sale was more than two (2) years.

Shortly after the passage of the Revenue Act of 1921, the Bureau of Internal Revenue had occasion to construe the capital gains section of that Act and held that property sold by an heir and acquired by inheritance qualified as capital assets if the date of decedent's death was more than two years before the sale. I. T. 1889, III-1 C. B. 70, (January to June, 1924). The Bureau's reasons were that the interest of a distributee of a decedent's estate attaches as of the date of decedent's death; that while the interest of the distributee is subject to account and distribution, it is an interest analogous to that of the beneficiary of the trust and vests at the date of the death of the testator; that the administrator takes no beneficial interest in the decedent's property; that the Bureau of Internal Revenue had theretofore adopted this doctrine in regulations and rulings; that Section 206 (c) of the Revenue Act of 1921, now Section 168 of the Revenue Act of 1928, reveals that Congress did not intend to require legal title and possession by the use of the terms "acquired and held" in the definition of capital assets; that the express purpose of enact-
[fol. 22] ing a capital gains section, i. e., to provide relief for taxpayers, negatives the idea that Congress attempted to distinguish between legal and beneficial interests; that the Bureau of Internal Revenue early adopted the view, both in regulations and rulings, that the capital gains section did not require actual possession of assets which qualified as capital assets in all cases.

In so far as Petitioners have been able to find, the construction aforesaid was not abandoned by the Bureau until the decisions of the Board in the McFeely and Dibblee cases. The Bureau's reasons for its construction of the definition contained in the capital gains section of the Revenue Act of 1921, re-enacted without material change in the Revenue Acts of 1924, 1926 and 1928 and 1932, are supported by the Supreme Court of the United States in Brewster vs. Gage (1930), 280 U. S. 327, 8 A. F. T. R. 10263, wherein the court says:

"The decree of distribution confers [now] new right; it merely identifies the property remaining, evidences right

of possession in the heirs or legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death. Foster vs. Fifield, 20 Pic., 67, 70; Wager vs. Wager, 89 N. Y. 161, 166; Thompson vs. Thomas, 30 Miss. 152, 158.

"Petitioner's right later to have his share of the residue vested immediately upon testator's death. At that time petioner became enriched by its worth which was directly related to and would increase or decline correspondingly with the value of the property."

In Minnesota an administrator, while taking legal title to personalty, takes for a special purpose only and really as a Trustee. The heirs' interests vest as of the date of decedent's death and during administration their interest is similar to the interests of beneficiaries of a trust. Mason's Minnesota Statutes for 1927, Sections 8726, 8786, 8880, Vail vs. Anderson, 61 Minn. 552, 65 N. W. 47, Granger vs. Harriman, 89 Minn. 303, 94 N. W. 869.

Section 113 (a) (c) of the Revenue Act of 1928 does not amend or modify the capital gains section of the law. To give it such effect is to ignore completely the effect of the reenactment of Sections 168 and 701 (b), supra, and the history of the times which occasioned the change in the basis section of the law.

[fol. 23] If the history of the times be resorted to, for the purpose of determining the intention of Congress in adopting Section 113 (a) (5) of the Revenue Act of 1928, it will disclose no expression or decision, at least in so far as petitioners have been able to find, indicating that Congress intended, by the adoption of that section, to effect the capital gains section of the law. On the contrary, there is direct evidence that Congress intended to and did re-enact capital gains sections in the Revenue Act of 1928 without change. Examination of report No. 960 of the Committee on Finance of the Senate on the Internal Revenue Bill of 1928 and report No. 1882 of the Conference Committee of both Houses of Congress on said Bill, and particularly page 26 of the first report, will disclose that McKinney vs. United States, (1926) —— Ct. Cls. ——, 5 A. F. T. R. 6041, influenced Congress to change the statutory rule which had theretofore obtained respecting basis of property acquired

by general bequest or through intestacy. Thus the report first referred to states in part:

"The decision of the Court of Claims in McKinney vs. United States has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate * * *. Accordingly the Committee has revised Section 113 (a) (5) and certain related Sections."

Cf. Report No. 704, Ways and Means Committee, Revenue Act of 1934, Page 28; Report of the Senate Finance Committee, Revenue Act of 1934, 343 C. C. H. 6813, 6834.

Petitioners have been unable to find in the reports referred to any statement that the capital gains section was included in the reference to "certain related sections." The court that decided the McKinney case determined that under Sections 202 and 213 of the Revenue Act of 1918, the measure of gain realized by an executor upon the sale of property which passed to him from the decedent was the difference between the cost to the decedent and the sale price. The court obviously was influenced by the fact that if the executor's gain was measured by the difference between value at the date of decedent's death and the sale price, a taxable gain would result when in fact there had been an actual loss, since the decedent's cost exceeded the sale price. Bankers Trust Company vs. Bowers, 23 F. (2) 941, Nichols vs. United States, (1927) 65 Ct. Cl. 241, and Straight vs. Commissioner, (1927) 7 B. T. A. 177, to the effect that an individual and his estate after his death are separate and distinct taxable entities and must be regarded as such in determining the income of the estate during the [fol. 24] period of administration, as distinguished from the individual's income during his lifetime, are opposed in principle to the conclusion reached by the court in the McKinney case. The Bureau of Internal Revenue adopted the rule of the McKinney case on April 6, 1927, reversing the position it had long adhered to respecting basis to an executor for gain or loss purposes and on that date promulgated T. D. 4010 (C. B. VI-1 249) amending Article 343 of Regulations 62; T. D. 4011 (C. B VI-1 77) amending Article 343 of Regulations 65 and 69, and T. D. 4012 (C. B. VI-1 248) amending Article 343 of Regulations 45. On July 7, 1928, however, it again reversed itself and reverted

to its original position that value at decedent's death was the proper basis to an executor for gain or loss. T. D. 4177, (C. B. VII-2 134). The report of the Joint Committee on Internal Revenue Taxation, on November 15, 1927, notes the confusion caused by the McKinney case in respect to the proper basis for gain or loss on sales by an executor and a beneficiary, and recommended to Congress that the basic date be the date of death of the decedent. See pages 17 and 74.

While, therefore, the basis for gain or loss purposes, in the case of property acquired by intestacy, etc., became value at date of distribution for the first time, by the enactment of Section 113 (a) (5) Revenue Act 1928, it nowhere appears that Congress had aught in mind than to change the wording of the section of the law relating to basis in order to avoid the doubt cast by the court that decided the McKinney case upon the meaning of the words "date of acquisition" found in corresponding sections of prior laws. It certainly does not appear that Congress intended thereby to affect the capital gains section. And it is clear from the reenactment of Section 168 that Congress thought an heir "held" from decedent's death. If this be not so and the Board's doctrine is sound, the rather absurd results are reached that gain from the sale of an intestate's personal estate by the administrator, who has held for over two years, which is distributable to the heir is taxable, because of Sections 168 and 101, to the heir at the capital gain rate while the same gain realized directly by the heir upon sale by him after distribution but within two years of the date of distribution is subject to normal and surtaxes, although in either case the property sold is the same, the holder of the beneficial interest by virtue of death is the same, in respect of the purpose of the capital gains section no change has resulted by distribution, and the property is the kind which Congress sought to have sold free of the high normal tax and surtax. This encourages [fol. 25] prolonged administration, justifies distrust of Bureau construction of the law and contempt for the judicial process which evolves such an anomaly.

We turn to a consideration of the proper construction of the capital gains section.

3. The purpose behind the enactment and retention of the capital gains section was unquestionably to encourage

the sale or exchange of property and relieve taxpayers of the onerous normal and surtaxes on gains realized. Hence the twelve and one-half per cent rate was provided. When Congress defined "capital assets" it did not have in mind only such property as was under the exclusive dominion and control of the taxpayers. "Held" is synonymous with "owned" and is broad enough to include property acquired by gift and to relate tenure back to the date of the donor's acquisition, broad enough to include property acquired in a tax free exchange and property the value of which is not subject to tax in the year received. Helvering vs. New York Trust Co., supra. It was thought by the Bureau to be broad enough to include property acquired by inheritance, the tenure to commence at decedent's death. I. T. 1889, supra. When the rules for determining tenure were added to the capital gains section they were not drawn so as to constitute limitations on the definition of "capital assets". No thought was expressed by the legislative committees that those rules applied to property acquired by inheritance.

The report of the Senate Committee on Finance on the Internal Revenue Bill of 1926 at page 18 contains the following:

"* * * Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact the question frequently arises as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The House bill incorporates in the law the present regulation of the Treasury and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. The same question arises in the case of property received by gift after December 31, 1920. The House bill provides that the period for which the property was held by the donor shall be added to the period for which the property was held [fol. 26] by the donee in determining whether or not the property so received falls within the capital gain or loss section."

It was never supposed that the rule, that property acquired by inheritance vests in the heir as of the date of death (Brewster vs. Gage, supra) was of doubtful validity until the McKinney case, and possibly the decision of the District Court in Brewster vs. Gage, speedily reversed. Certainly the Bureau regarded the rule as sound. I. T. 1889, supra. It has never revoked that ruling to Petitioners' knowledge. Nor was it ever supposed that the period during which an executor or administrator held title was not a period of holding by the heir.

Congress has never seen fit to attempt to tax as income to the heir upon sale all the appreciation in value of property inherited over the cost to the decedent. Until the 1928 Act was passed, the statutory rule for measuring an heir's gain was difference between value at the date of death and sale price. Thereafter and until the 1934 Act, it was the difference between value at date of distribution, in case of property acquired by general bequest or intestacy, and sale price, a change within the powers of Congress and not compelling the conclusion that the capital gains section was affected. Helvering vs. New York Trust Co., supra.

In this situation no sound reason appears for adopting any other construction of the capital gains section than that where property such as petitioners sold is acquired by general bequest or intestacy, it is owned and therefore "held" from decedent's death; that where property is acquired by tax free exchange, it is "held" from the date of acquiring the property exchanged; and that where property is received by gift, the donated property is "held" from the date of donor's acquisition. Any other construction nullifies related sections of the law and the purpose of the capital gains section.

Certainly, since Helvering vs. New York Trust Co., if the period of holding of each of two different persons, each having beneficial title for his own use, may be added, it is permissible to unite periods of beneficial and legal title held by one and the same person or held by the taxpayer and his mere representative.

Conclusion

Accordingly, it is respectfully submitted that the opinion and decision of this Honorable Board in the above entitled cases should be set aside and the sole issue submitted to

[fol. 27] this Honorable Board reconsidered and decided in Petitioners' favor.

Leland W. Scott, Hayner N. Larson. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, 1300 First National-Soo Line Building, Minneapolis, Minnesota; Cobb, Hoke, Benson, Krause & Faegre, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Dockets Nos. 53902, 57365, 60782, 60784, 60785

[Title omitted]

ORDER, AUGUST 25, 1934, VACATING ORDER OF REDETERMINATION OF MAY 28, 1934

On May 24, 1934, the Board entered its memorandum opinion in these proceedings and on May 28, 1934, entered its decisions in accordance with said memorandum opinion.

On July 23, 1934, petitioners filed motion to vacate the decisions of the Board and asked for reconsideration. This motion was referred to Division 8 (Turner) for consideration. Said Division Member is now out of Washington and has not the time to act upon said motion prior to the expiration of the time for appeal to the United States Circuit Court of Appeals by petitioners. Wherefore, in order to give said Division Member time and opportunity to consider and act upon said motion for reconsideration, the decisions heretofore entered in these proceedings on May 28, 1934, are vacated and set aside.

(Signed) Eugene Black, Member. (Seal of U. S. Board of Tax Appeals.)

Dated: Washington, D. C., August 25, 1934.

[fol. 28] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

R. R. RAND, JR., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ORDER OF REDETERMINATION, SEPTEMBER 13, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered May 24, 1934, it is

Ordered and Decided: That there is a deficiency of $20,736.45 for the year 1928.

Bolon B. Turner, Member. (Seal U. S. Board of Tax Appeals, 1924.)

Entered: Sep. 13, 1934.

IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

Board of Tax Appeals Docket No. 60784

[Title omitted]

PETITION OF RUFUS R. RAND, JR., FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS—Filed October 26, 1934

To The Honorable, The Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

The Petitioner, in support of this, his petition, filed pursuant to the provisions of Section 1001 of the Act of Congress approved February 26, 1926, otherwise known as the "Revenue Act of 1926", 44 Stat. 109, U. S. C. Title 26, Section 1224, and the Acts amendatory thereof and supplemental thereto, being Section 603 of the Act of Congress approved May 29, 1928, otherwise known as the "Revenue Act of 1928", 45 Stat. 873, and Section 1101 (a) of the Act of Congress approved June 6, 1932, otherwise known as the "Revenue Act of 1932", 47 Stat. 286, for the review of the decision of the United States Board of Tax Appeals, entered on May 28, 1934, approving a deficiency in income taxes of the Petitioner for the calendar year 1928 in the

[fol. 29] amount of Twenty Thousand Seven Hundred Thirty-six and 45/100 Dollars ($20,736.45), respectfully presents to this Honorable Court the following:

I

Statement of the Nature of the Controversy

The above entitled cause involves the legality of the action of the Commissioner of Internal Revenue of the United States in determining that shares of stock, inherited from an intestate who died on October 31, 1925, and distributed to the Petitioner on January 28, 1927, pursuant to a decree of distribution, were not "held" more than two years by said Petitioner by May 28, 1928, when said shares were sold, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, and that they did not come within the meaning of "capital assets" as defined in said Section of said Revenue Act.

II

Declaration of the Court of Review

Petitioner resides at Stillpond, near Minnetonka Mills, Hennepin County, State of Minnesota, and did, for the year 1928, make his return for Federal income tax purposes to the Collector of Internal Revenue in and for the District of Minnesota. Petitioner, being aggrieved by the decision of the United States Board of Tax Appeals, aforesaid, and by the opinion of said Board filed therewith, now seeks a review thereof in accordance with the provisions of the Act of Congress approved February 26, 1926, and the Acts amendatory thereof and supplemental thereto, as aforesaid, by the United States Circuit Court of Appeals for the Eighth Circuit, within which circuit is located the office of the Collector of Internal Revenue of the United States for the District of Minnesota, with whom Petitioner made and filed his return of income.

III

Assignment of Errors

Petitioner, as a basis for review, makes the following Assignment of Errors:

1. The Board erred in holding that stock inherited by Petitioner from an intestate who died October 31, 1925,

which stock was distributed to Petitioner on January 28, 1927, and sold by Petitioner on May 28, 1928, was not property "held" by Petitioner, more than two years and, hence, was not a "capital asset" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

[fol. 30] 2. The Board erred in that its holding is based on the theory that property, to qualify as "capital assets", within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, must have been under the dominion and control of the taxpayer alone fully and exclusively for over two (2) years.

3. The Board erred in not determining that the period of "holding" of said stock by Petitioner, within the meaning of Section 101 (c) (8) of the Revenue Act of 1928, also included the period from the intestate's death to the time of distribution of the property of his estate.

4. The Board erred in that, in so refusing to recognize as part of the time said stock was "held" by Petitioner, within the meaning of said Section 101 (c) (8), the period between the death of the intestate and the distribution to Petitioner, its decision runs counter to the provisions and the spirit of Section 168 of the Revenue Act of 1928, whereby the income of an estate or trust or of a beneficiary of an estate or trust specifically is made subject to the capital gain rate provisions of said Section 101 (a), even though exclusive dominion and control over the property of the estate or trust does not rest in the beneficiary thereof.

5. The Board erred in con-truing together, and thereby confusing, the unrelated Sections 101 (c) (8) and 113 (a) (5) of the Revenue Act of 1928, and in concluding that the period during which property is "held", within the meaning of the former section, defining capital assets, commences only at the basis date, specified by the latter section, for determining gains or losses from the sale or other disposition of property.

6. The Board erred in failing to recognize and give effect to Section 701 (b) of the Revenue Act of 1928 in its relation to Section 101 (c) (8) (B) of said Act, by giving to the word "included" of the latter Section an exclusive interpretation, instead of construing it in a way not exclusive of other things otherwise within the meaning of the word "held".

7. The Board erred in concluding that profits realized from the sale on May 28, 1928 of stock inherited by Petitioner from an intestate, who died October 31, 1925, and distributed to Petitioner on January 28, 1927, was taxable as ordinary income under Sections 11 and 12 of the Revenue Act of 1928 and not as "capital gains" under Section 101 (a) of said Act.

Wherefore, your Petitioner prays that this Honorable Court may review the decision of the United States Board [fol. 31] of Tax Appeals, its findings and opinion, and reverse and set aside the same, and that the Clerk of the United States Board of Tax Appeals be directed to prepare, transmit and deliver to the Clerk of this Honorable Court certified copies of all and every of the documents necessary and material to the presentation and consideration of the foregoing Petition for Review, and as required by the rules of this Honorable Court and the statutes made and provided.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota. Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota, Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Duly sworn to by Leland W. Scott. Jurat omitted in printing.

BEFORE U. S. BOARD OF TAX APPEALS

NOTICE OF FILING OF PETITION FOR REVIEW AND SERVICE—Filed October 26, 1934

To Robert H. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent:

[fol. 32] You Are Hereby Notified that Rufus R. Rand, Jr., did, on the 26th day of October, 1934, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a Petition for Review by the United States Circuit Court of Appeals for the Eighth Circuit of the decision of the Board heretofore rendered in the above en-

titled case. A copy of the Petition for Review and the Assignment of Errors, as filed, is hereto attached and hereby served upon you.

Dated this 26th day of October, 1934.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota; Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota, Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Personal service of the foregoing Notice, together with a copy of the Petition for Review and Assignment of Errors mentioned therein is hereby acknowledged this 26th day of October, 1934.

Robert H. Jackson, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 60784

RUFUS R. RAND, JR., Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue, Respondent

Statement of Evidence—Lodged November 24, 1934 and Filed December 4, 1934

The above entitled cause came on for hearing on the 23rd day of March, 1934, before the Honorable William C. Lansdon, then a Member of the United States Board of Tax Appeals, at St. Paul, Minnesota, pursuant to notice of hearing theretofore given. The facts were stipulated and, in so far as pertinent here, are as follows:

[fol. 33] STIPULATION OF FACTS

1

That the number of shares of the common capital stock of the Minneapolis Gas Light Company outstanding from before 1905 to April 30, 1925, was 16,000 of a par value of

$50.00 each; that on March 3, 1925, said company declared and on April 30, 1925, issued a stock dividend of 175% and that at all times thereafter the number of shares of common capital stock of said company outstanding was 44,000 shares of a par value of $50.00 each; * * * that on January 28, 1927, there were distributed to petitioner, * * * Rufus R. Rand, Jr., * * * 962⅔ shares * * * of said stock pursuant to a decree of distribution from the Estate of Alonzo T. Rand, who died intestate October 31, 1925, all of which said shares were sold on May 28, 1928, as hereinafter set forth.

2

* * * That the 962⅔ shares of the said Minneapolis Gas Light Company distributed to * * * the petitioner Rufus R. Rand, Jr., * * * under date of January 28, 1927, had a fair market value on that date of $176.00 per share.

3

That on May 28, 1928, the petitioner sold the shares of common stock of said Minneapolis Gas Light Company acquired as stated in Paragraph 2 above for cash as indicated below:

Name of Petitioner	Valuation date	Number of shares before stock dividend	Basis for gain or loss	Cash received	Taxable gain
* * *	* * *	* * *	* * *	* * *	* * *
Rufus R. Rand, Jr.	January 28, 1927	962 2/3	$169,419.33	$439,261.05	$269,841.72
* * *	* * *	* * *	* * *	* * *	* * *

It was further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company stock distributed to the petitioner herein under date of January 28, 1927, constitutes capital gain and is taxable at the rate provided in Section 101 of the Revenue Act of 1928, the Board might enter final order of deficiency or overpayment as follows:

Name of Petitioner	Deficiency	Overpayment
* * *	* * *	* * *
Rufus R. Rand, Jr.	.....	$13,545.09
* * *	* * *	* * *

It was further stipulated and agreed that if the gain derived from the sale of the Minneapolis Gas Light Company [fol. 34] stock distributed to said petitioner on January 28, 1927, is not capital gain and is not taxable at the rate provided in Section 101 of the Revenue Act of 1928 but at the normal and surtax rates provided for by said Act, the Board might enter its final order of deficiency or overpayment as follows:

Name of Petitioner	Deficiency	Overpayment
• • •	• • •	• • •
Rufus R. Rand, Jr.	$20,736.45	.....

4

That the Estate of Alonzo T. Rand, who died intestate October 31, 1925, had personal property of a market value of at least $1,840,948, and real estate of a market value of at least $263,800, a total of $2,104,748. Included in the personal property were cash of $223,814.73 and United States Government obligations of a market value of $145,829.60, a total of $369,644.33. During administration and prior to January 28, 1927, the estate had cash receipts of $161,995.97. Debts and obligations of the estate, constituting all debts and obligations paid or payable before and after January 28, 1927, were as follows:

1. Expenses of administration	$50,049.12
2. Funeral expenses	785.00
3. Taxes other than estate taxes	28,172.26
4. Claims of creditors	6,374.01
5. State and Federal estate taxes	178,451.90
A total of	$263,832.29

MOTION OF PETITIONER FOR JUDGMENT IN HIS FAVOR

Thereupon, on behalf of Petitioner, it was moved that there be judgment in favor of Petitioner and against Respondent on the ground and for the reasons that under any theory of the evidence in this case he is entitled to a judgment of ove payment in the amount of $13,545.09; that he is entitled to have the gain realized from the sale of said shares of stock of Minneapolis Gas Light Company taxed as capital gain under the provisions of Section 101 of the

Revenue Act of 1928 instead of at the normal and surtax rates provided for by said act.

Whereupon said motion was overruled, and an exception thereto noted.

[fol. 35] PRAYER OF PETITIONER FOR APPROVAL OF STATEMENT OF EVIDENCE

The Petitioner, Rufus R. Rand, Jr., tenders and presents the foregoing as a Statement of the evidence in this case and of the proceedings had upon the trial hereof, and prays that the same may be approved by the United States Board of Tax Appeals and made a part of the record in this cause.

Leland W. Scott, 1300 First National-Soo Line Building, Minneapolis, Minnesota, Hayner N. Larson, 1260 Northwestern Bank Building, Minneapolis, Minnesota. Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

APPROVAL OF STATEMENT OF EVIDENCE BY COUNSEL FOR RESPONDENT

The foregoing Statement of Evidence is all of the evidence material upon appeal adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel of the Bureau of Internal Revenue, as Attorney for the Respondent.

Robert H. Jackson, Attorney for Respondent.

ORDER APPPOVING STATEMENT OF EVIDENCE

I hereby certify that the foregoing Statement of Evidence has been examined by me and found conformable to the truth and to contain all of the evidence in said cause.

The foregoing Statement of Evidence is hereby approved and signed and ordered to be made of record in the above entitled cause this day of ——, 1934.

—— ——, Member of the United States Board of Tax Appeals.

Approved and Ordered Filed this 4th day of Dec. 1934.

(Sgd.) Bolon B. Turner, Member.

[fol. 36] BEFORE U. S. BOARD OF TAX APPEALS

PRÆCIPE FOR TRANSCRIPT—Filed December 17, 1934

To the Clerk of the United States Board of Tax Appeals:

You are requested by the Petitioner in the above entitled cause to make a transcript of record therein to be filed in the United States Circuit Court of Appeals for the Eighth Circuit, pursuant to review taken in said cause, and to include in such transcript of record copies, duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board in the above entitled cause.

2. Pleadings before the Board in the above entitled cause:

(a) Petition.

(b) Answer.

3. The Memorandum Opinion of the Board promulgated May 24, 1934.

4. The decision in the above entitled cause entered May 28, 1934.

5. Motion to vacate decision in the above entitled cause.

6. Order of the Board entered August 25, 1934, vacating the decision of May 28, 1934.

7. The final decision of the Board in the above entitled cause entered September 13, 1934.

8. The Petition for Review of the above entitled cause, with Notice of filing and proof of service thereof.

9. The Statement of Evidence in the above entitled cause, as approved and filed.

10. This Præcipe.

The foregoing to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Eighth Circuit.

Leland W. Scott, 1300 First National-Soo Line Bldg., Minneapolis, Minnesota.

[fol. 37] Hayner N. Larson, 1260 Northwestern Bank Bldg., Minneapolis, Minnesota. Attorneys for Petitioner. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker, Cobb, Hoke, Benson, Krause & Faegre.

Received a copy of the foregoing præcipe which is hereby agreed to this 17th day of December, 1934.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, Counsel for Respondent.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 38 & 39] Appearances of counsel omitted in printing.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

STIPULATION THAT DECEDENT, ALONZO T. RAND, WAS AT DATE OF DEATH A CITIZEN AND RESIDENT OF STATE OF MINNESOTA—Filed April 2, 1935

It is stipulated and agreed that the decedent, Alonzo T. Rand, was at the date of his death a citizen and resident of the State of Minnesota.

Leland Scott, J. B. Faegre, Hayner N. Larson, Attorneys for Petitioner; Frank J. Wideman, Assistant Attorney General, Attorney for Respondent.

[File endorsement omitted.]

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER OF SUBMISSION—May 15, 1935

This cause having been called for hearing in its regular order, the same was argued by Mr. Hayner N. Larson for petitioner and by Mr. Frank J. Wideman, Assistant Attorney General, for respondent.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

[fol. 42] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1935

No. 10,224

Rufus R. Rand, Jr., Petitioner,

vs.

Guy T. Helvering, Commissioner of Internal Revenue, Respondent

On Petition to Review Decision of United States Board of Tax Appeals

Mr. Hayner N. Larson (Mr. Robert Driscoll, Mr. J. B. Faegre, Mr. Leland W. Scott, Mr. Harry Blackmun, Messrs. Junell, Driscoll, Fletcher, Dorsey & Barker and Messrs. Cobb, Hoke, Benson, Krause & Faegre were with him on the brief), for petitioner.

Mr. Frank J. Wideman, Assistant Attorney General (Mr. Sewall Key, Special Assistant to the Attorney General, and Mr. John MacC. Hudson, Special Assistant to the Attorney General, were with him on the brief), for respondent.

Before Stone, Woodrough and Booth, Circuit Judges

Opinion—August 13, 1935

Stone, Circuit Judge, delivered the opinion of the court:

This is a petition to review a redetermination of income taxes for the year 1928. Alonzo T. Rand died intestate on [fol. 43] October 31, 1925, leaving a large estate of real and personal property. As one of the heirs, petitioner received from the estate certain corporate stock on January 28, 1927, under an order of distribution. On May 28, 1928, he sold this stock at a profit.

Petitioner claimed the right to return this profit as capital gains. The Commissioner denied this claim and treated the profit as ordinary income. The ground for such denial was that the stock had not been held by petitioner "for more than two years" and therefore did not constitute "capital assets" subject to the application of the "capital gain" rate under the applicable Revenue Act of

1928, Sec. 101(a), (c) (1) and (c) (8). Whether such holding was for more than two years, depends upon whether it began at the death of Alonzo T. Rand or at the date of distribution of this stock to petitioner. The Board confirmed the Commissioner (30 B. T. A. 1464), upholding date of distribution. This it did upon the authority of McFeely, 29 B. T. A. 998, and Dibblee, 29 B. T. A. 1070, without further statement of reasons. These two citations have passed to affirmance in McFeely v. Helvering, 74 Fed. (2d) 1017, C. C. A. 3 and Dibblee v. Helvering, 75 Fed. (2d) 617, C. C. A. 9. The same view has been taken in Ogle v. Helvering, 77 Fed. (2d) 338, C. C. A. 2 (where the petitioner was another heir of Alonzo T. Rand) and the contrary view is declared in First Nat. Bank of Boston v. United States, 76 Fed. (2d) 200, C. C. A. 1. The only issue here is whether petitioner's holding of this stock began at death of Alonzo T. Rand or at date of distribution.

Section 101(a) permits a flat rate of 12½% of "capital net gains" in lieu of surtaxes—at the option of the taxpayer. Section 101(c) contains the definitions for application of this flat rate. "Capital net gain" is defined, (c)(5), as being "capital gain" less certain deductions. "Capital gain" is defined, (c)(1), as taxable gain from the sale or exchange of "capital assets". "Capital assets" are defined, (c)(8), as being "property held by the taxpayer for more than two years", with certain exceptions not here pertinent. A portion of (c)(8) is as follows:

"For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property ex- [fol. 44] changed, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution."

Concisely stated, the opposed contentions of the parties are as follows. The Commissioner urges two matters: (1) That the holding period of more than two years must be construed under the influence of Section 113 (a) (5) which declares the basis for determining gain (for ordinary income tax purposes) from sales of property transmitted at death and that such basis is, as to intestate estates, "the fair market value of the property at the time of the distribution to the taxpayer". The reason advanced for this position is that the two sections are "applicable to different elements of the same or like transactions"—a reason which, he contends, is particularly fortified by the inclusion in the definition of capital assets of the requirement in 101 (c) (8) (B) as to tenure of a predecessor (in certain situations) in estimating the two-year period. (2) That standing unaffected by section 113, "held" as used in Section 101 (c) (8) must be construed as being from date of distribution, because such results from giving that word its ordinary meaning.

The position of petitioner is (1) that section 113 has nothing to do with 101 (c) (8) as to the issue here and (2) that "held" should be construed as beginning with the time [fol. 45] he acquired the stock which was the date of death. The reasons urged as supporting the exclusion of consideration of Section 113 are that its inclusion would result in different applications of Section 101 depending solely on differences in kind of property transmitted by death and differences in form of transmission from decedent; that it would defeat the prime purpose of section 101; and, as to 101 (c) (8) (B), that it has no bearing on the issue here except to accentuate the intention of Congress to broaden rather than restrict the influence of the capital gains section (101). The reasons for construing "held", in 101 (c) (8), as beginning with the death are that the holding begins

necessarily when the stock is acquired and that it has been judicially determined (Brewster v. Gage, 280 U. S. 327) that such property is acquired at the death.

Application of Section 113.

It seems logical to inquire first whether Section 113 should be considered in construing Section 101 (c) (8) because if it is then we are not controlled by the construction of 101 (c) (8) standing alone. In such inquiry, it is advisable first to determine the influence upon this consideration of Section 113 which may be exerted by paragraph (B) of 101 (c) (8). The sole effect of that paragraph is to extend the period of holding in those instances where section 113 has gone further back than the actual acquisition by the taxpayer—such as in gifts, where the holding of the donor is regarded as that of the donee taxpayer for estimating income tax gain purposes (section 113 [a] [2]). The effect is to create a substituted for an ordinary legal basis with the result that tenure or holding is thereby (in a sense) artificially extended. Where the normal legal tenure reaches to the earlier date, there is no place for such extension. Clearly, property cannot in any true sense be "held" until the holder has some character of legal interest therein. A residuary legatee or an heir of an intestate has a legal interest from time of death so it is entirely reasonable that such legatee or heir might be designated as holding from death and Revenue Statutes prior to the Act of 1928 have been so construed (Brewster v. Gage, 280 U. S. 327). Therefore, there is no place in such a situation to employ a substituted extension to carry the "acquisition" of legal interest back to death. We think neither paragraph (B) nor any inference from it is of any aid here.

[fol. 46] Taking up next whether section 113 is so related in its subject matter to section 101 that they should be construed together. This question seems directly determined by Helvering v. N. Y. Trust Co., 292 U. S. 455, when considered in connection with the situation here. In that case the court was faced with the problem of whether a trustee who had sold property less than two years after creation of the trust but more than two years after acquisition by the creator of the trust was entitled to the advantages of the capital gains provision of the Revenue Act of 1921. The capital gains section of that Act was section 206 which was

the forerunner of section 101 here. Section 202 of that Act is the forerunner of section 113 here. In construing the language of section 206 (a) (6), defining "capital assets", the court said that the language there (as here in section 101) "held * * * for more than two years" standing alone might be entirely clear as meaning only from creation of the trust (pp. 463, 464, 465) but that "Sections 202 (a) (2) and 206 (a) (6) are included in the same Act and are applicable respectively to different elements of the same or like transactions and are not to be regarded as wholly unrelated" (p. 467). The Court then construed the two sections together in the light of the legislative history and the object intended to be accomplished and determined that "held * * *, for more than two years" included (in the case of this trustee who was regarded as a donee under 202[a][2]) the period of holding by the creator of the trust.

In that case, the ambiguity as to the meaning to be given "held", in the statutory expression "held * * * for more than two years", arose when the language used was compared with facts or transaction in respect of which the intent and purpose was to be ascertained (p. 465). The situation here presented demands the same treatment. This statute is a whole and states the requirements as to income taxation. In construing any part of it, such construction must have the entirety in mind. This is merely applying a fundamental rule of construction—applicable alike to statutes, instruments and transactions. The particular matter to be construed will indicate what, if any other parts of the statute might be affected. The purpose and legislative history (Helvering v. N. Y. Trust Co., 292 U. S. 455, 464) of these various related parts of the Act will guide to the proper meaning for all of them.

[fol. 47] Here there is a clear relation between section 113 and section 101. Both deal with taxation of gains derived from sales of property. The former determines the measurement of such gains for all income tax purposes, irrespective of rate of taxation to be applied. Such measurement required a statement, in general or particular terms, of the base value date and such dates are stated therein as to various situations. Section 101 is a rate of tax provision applicable to the taxable sale gains as measured in 113. Section 101 required a prescribed holding period to make its privileges available to the taxpayer—obviously, any holding

period must have a legal beginning or base value date. Thus the situation is that of a taxable gain measure base value date (Section 113) and a tax rate base value date (Section 101) upon the gain so measured—both applying to the same character of gain, to-wit, from sales of property. Clearly the two are closely related and there should be no construction as to this date in 101 without regard to 113.

As the two sections should be considered together, we pass to the purpose of 101 to ascertain in what respect that is affected by 113. This purpose is clear (67th Congress, 1st Session, House Report No. 350, p. 10 and Senate Report No. 275, p. 12; Helvering v. N. Y. Trust Co., 292 U. S. 455, 466; Helvering v. Bliss, 293 U. S. 144, 148). The situation sought to be remedied by this section was as follows. The income tax period was one year and covered gains during the year. Enrichment through mere increase in value of property was not regarded as taxable gain until there was a realization thereof through sale or otherwise (McLaughlin v. Alliance Ins. Co., 286 U. S. 244, 249; Weiss v. Wiener, 279 U. S. 333, 335). Such realization might, and often did, represent the accumulating increase over many years yet the entire gain was taxed to the year in which realized. Often this would raise the taxable income considerably in the surtax rate brackets. Where such raise would occur, it prevented many sales and the realization of taxable gains therefrom. "In order to permit such transactions to go forward without fear of a prohibitive tax" (House Report, supra), the Revenue Act of 1921, Sec. 206, introduced the plan of a flat restricted surtax rate applicable to such situations and made its use optional with the taxpayer. The sole purpose of such provision was "to relieve gain thus derived [fol. 48] of the heavy surtaxes then applicable" (Helvering v. Bliss, 293 U. S. 144, 148). While the provision is to be construed liberally (Helvering v. Bliss, 293 U. S. 144, 150-151) to effect this purpose, it is obvious that construction should be confined to the purpose.

It was no part of the intention of Congress that the taxpayer should escape payment on any portion of the taxable gain—no matter over what period the gain had accumulated. The remedy was solely by an optional special rate of taxation upon such gain which rate might be advantageous to the taxpayer. The important thing was the amount of the tax to be paid and this was brought

about through the combined effect of rate and taxable gain—the difference was solely in rates. If the taxpayer had held the property only during the tax year of realization, clearly there was no purpose in relieving him from any part of the regular tax. Congress had in mind the one situation of gain accumulated over a longer period. This it clearly expressed in the requirement that the property should be "held" for more than two years. Nor was Congress interested in accumulations which were not taxable to the taxpayer involved for such lay entirely outside its purpose in enacting the capital gains rate. The only thing involved was accumulations of taxable gain by the particular taxpayer. Therefore, to give full effect to the purpose of 101 and, at the same time, to limit that section to its full purpose, the two-year period must be construed as controlled by the taxable gain provisions of section 113—unless (not true here) Congress has clearly expressed some other intention.

So applying section 113, we find that it expressly fixes the base value date for measuring taxable gain from sales by the heir of an intestate as being the date of distribution to him of the property sold. Accumulations prior to that date do not affect his tax because his measurement of taxable gain begins with that date.

Petitioner argues that such a result produces a difference in like situations which amounts to an absurdity. It is true that difference exists under 113 in the measure of taxable gain, because as to real property and specific devises of personalty taxable gain dates from death while as to personalty devolving through residuary devise or intestacy taxable gain dates from distribution. Also it is true that if 101 is construed as controlled by this measure of taxable gain, a corresponding difference will appear in the meas- [fol. 49] urement of the more than two-year period under 101 and therefore in the right to come under that section. However, this difference is so clearly expressed in 113 that there can be no room for construction as to what Congress meant as to the measure of taxable gain in the above instances, and there can be no question of the power to make such distinction (Helvering v. N. Y. Trust Co., 292 U. S. 455, 467; Brewster v. Gage, 280 U. S. 327, 335). The argument then amounts to a claim that to carry this difference into 101 by construction results in an absurdity not to be attributed to Congressional intention. The reason urged

for existence of such absurdity is that it would result in different treatment of like situated taxpayers. Like situated in what respect? Obviously, in respect to the time (death) when property interest may be regarded as attaching to the property. But this like situation did not appear judicially in connection with taxing statutes until Brewster v. Gage, supra, which was decided in 1930, after enactment of the Revenue Act of 1928. Before that decision, Congress might well have felt doubtful as to whether for taxation on sales gains it should or, possibly, could adopt the same standard of date of beginning of holding—acquisition—for real estate and specific devises of personalty as for personalty coming residuary or intestate. This doubt is strongly intimated in the Senate Report (No. 960, 70th Congress, 1st Session, p. 26) on the Act of 1928, and is directly declared in the Reports (73rd Congress, 2nd Session, H. R. No. 704, p. 28, and S. R. No. 558, p. 35) on the Act of 1934, made after Brewster v. Gage, as follows:

"Section 113 (a) (5) of the Revenue Act of 1932 is a re-enactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (Brewster v. Gage, 280 U. S. 327). Section 113 (a) (5) of the bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

[fol. 50] In this view of the Congressional mind as to the law when considering the 1928 Act, it is clear that the similarity of situation was by no means then clear.

But there is another consideration in this regard. To construe 101 as petitioner contends produces the situation following. The purpose of 101 is to afford relief from excessive surtaxes as to realized gains accumulating for more than two years in the taxpayer; such gains on real estate and specific devices are measured from death and the more than two-year period under 101 begins at that

time; such gains on personalty derived as residuary legatee or in intestacy are measured from distribution yet the period under 101 goes back further to the death. A possible result (as here) is that specific property may be identified to the residuary legatee or heir only a few months before sale by him so that he could not have known longer than those months either the property he could sell or, more important here, what the tax effect upon him of the sale would be and yet he could avail himself of a statute passed for the one purpose of not retarding sales because of the tax result arising from accumulation of gain for more than two years. Thus parties in like position, as to the purposes of 101 to relieve from accumulations of gains), are differently treated and one of them given an advantage much beyond the fullest purpose of the statute. If construed as the Commissioner contends, all derivators from an estate are, as to the purposes of the section, treated exactly alike.

While we are convinced that section 101 should be construed in the light of section 113, yet the result would be the same if section 101 were alone considered for then the language there used would govern and that language clearly limits "held" to the period after distribution (Helvering v. N. Y. Trust Co., 292 U. S. 455, 463, 464, 465).

The determination of the Board is Affirmed.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS
EIGHTH CIRCUIT

No. 10224

REFUS R. RAND, JR., Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue

On Petition to Review Decision of United States Board of Tax Appeals

DECREE—August 19, 1935

This cause came on to be heard on the petition to review a redetermination by the United States Board of Tax Appeals of the income taxes of the petitioner, Refus R. Rand, Jr., for the year 1928, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of redetermination of the said Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

And it is further ordered, that the said petition to review in this cause be, and the same is hereby, dismissed without the taxation of costs in favor of either of the parties in this Court.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF PETITIONER FOR STAY OF MANDATE—Filed Aug. 22, 1935

Comes now the above named petitioner, Rufus R. Rand, Jr., by Robert Driscoll, his attorney, and respectfully moves this Honorable Court to stay and withhold its mandate in the above entitled action for the purpose of permitting said petitioner to file with the Clerk of the Supreme Court of the United States his petition for a writ of certiorari in said cause, until and including the 23rd day of September, 1935, and to order that the stay of said mandate be continued, if on or before that date said petition is filed and the Clerk of this Court receives from the Clerk of the Supreme Court his certificate of said filing, until the final disposition of said cause by the Supreme Court of the United States, all as provided by Rule 32 of this Court.

Dated August 20th, 1935.

Robert Driscoll, Attorney for Rufus R. Rand, Jr., Petitioner, 1300 First National-Soo Line Building, Minneapolis, Minnesota. Of Counsel: Junell, Driscoll, Fletcher, Dorsey & Barker; Cobb, Hoke, Benson, Krause & Faegre.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING ISSUANCE OF MANDATE—August 26, 1935

On Consideration of the motion of petitioner for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari,

It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 137.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,993. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 439. Rufus R. Rand, Jr., Petitioner, vs. Guy T. Helvering, Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed September 12, 1935. Term No. 439, O. T., 1935.